72-1719

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Supreme Court of the United States

October Term, 1972.

WILLIAM J. BENDER,

Petitioner,

against

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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In The

SUPREME COURT OF THE UNITED STATES
October Term,
1973

NO. - 528-71

WILLIAM J. BENDER,

Petitioner,

-v-

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Plaintiff prays that a writ of certiorari issue to review the order and judgment of the United States Court of Claims entered in the above entitled case on March 6, 1973, and the order denying plaintiff's motion for rehearing entered in said case on May 8, 1973.

Opinions Below

The opinion of the United States Court of Claims is not reported, and is set forth in the Appendix, infra, at pp. A 3-5. The opinion of the same Court on plaintiff's petition for rehearing is unreported, and is set forth in the Appendix, infra, at pp. A 6-8.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i). The order of the United States Court of Claims granting summary judgment in favor of the defendant and against plaintiff was entered on March 6, 1973.

(ii). Plaintiff's petition for rehearing of the cross-motions for summary judgment was denied by order

entered May 11, 1973.

(iii). The jurisdiction of this Court is conferred by 28 USC 1255 (1).

QUESTIONS INVOLVED

1. In a litigation where plaintiff mounts a threshhold attack upon the nullity of an administrative order absolutely void on its face for want of jurisdiction, did the Court of Claims abandon its function by finally disposing of the litigation without meeting or resolving the jurisdictional issue therein raised and fairly presented?

2. If it is never too late to impeach a judgment or order absolutely void on its face for want of jurisdiction to render it, is it competent for the Court of Claims to bar the jurisdictional attack upon the sole ground of laches?

3. Where an administrative order, absolutely void on its face for want of power to make it, is the basis of a judgment of the Court of Claims, is the judgment of the Court of Claims also void?

4. Does the absence of notice and an opportunity to be heard deny to plaintiff his constitutional rights under the Fifth Amendment to the United States Constitution so as to render null and void the administrative order based thereon?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED.

The Fifth Amendment of the United States Constitution provides: "No person shall be ... deprived of life, liberty or property without the due process of law."

Department of the Army Special Regulations, 615-25-55, May 2, 1952, as changed by Change 2, October 6, 1952, and Change 3, November 10, 1953, provides in part as follows: (Full text appears in Appendix 1 hereto):

> "11. When effective: Reduction of enlisted personnel will be effective -

a. When by sentence of Courts Martial. * * *
b. When by operation of law. * * *
c. In all other cases. - On the date upon which notice of reduction is received by the enlisted person, or, if absent for their own convenience, or through their own fault, upon the date the notice of reduction is received at their proper station."

STATEMENT OF THE CASE

This is a soldier's pay case. Plaintiff was twice administratively reduced in rank and grade upon the alleged ground of inefficiency pursuant to Department of the Army Special Regulation 615-25-55. In pertinent part his petition in the Court below (pars. 5 and 24) alleged:

"5. In connection with his aforesaid administrative reduction in grade and rank:

a. (Withdrawn on motion).
b. He was not given notice and an opportunity to be heard in connection with any charge relating to his conduct or efficiency in the performance of his duties as a soldier, or in relation to any other charge against him.
c. No Court Martial or Non-Judicial Hearing was ever had in relation to his conduct or efficiency as a soldier, or in connection with any other charge against him, or in connection with his reduction.
d. He was never served with or given, nor did he ever receive a copy of any complaint or charge against him, or of any order, or special order relating to his conduct or efficiency as a soldier or otherwise, or relating to his administrative reduction in rank and grade, although he was neither absent

through his own fault, or for his own convenience from his command, and was, at all times, present and available for service upon him of a copy of any such charge or complaint against him, or order or special order in relation thereto.

e. He was administratively reduced in rank by Special Order No. 11 of January 14, 1954, effective retroactively to the preceding January 13, 1954.

f. (Withdrawn on motion).

g. There are no entries in his service record reflecting to his discredit. Entries in his service record relating to his conduct during his term of service are uniformly characterized as "Excellent" (except as to those entries marked "Unknown") from the commencement of his term of service to the date of honorable discharge; and those entries therein relating to his efficiency are characterized (except where stated as "Unknown"), as

"Satisfactory", "Superior", and "Excellent" for his entire term of service in the Army to the date of his honorable discharge therefrom.

h. (Withdrawn on motion).

i. There is in his service record no basis for the reduction. There exists no basis in fact, or ascertainable reason in any way connected with his military service, or his conduct or efficiency in relation thereto upon which such reduction in grade and rank may be founded."

"24. He was deprived of pay, rank and advancement, and subjected to forfeiture of property and rights to which he was entitled by law without due process of law, and in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States."

Plaintiff was twice retroactively reduced. The petition alleges the first reduction in paragraph 5 (e) as

as above related. Defendant's answer to the petition admits the order to be retroactive. The second reduction (raised on the plaintiff's motion for summary judgment) by Special Order of 15 March 1954, was retroactive to 1 March, 1954.

Plaintiff, having exhausted his administrative remedies,* brought suit in the Court of Claims, and there made a collateral attack upon the reduction

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* Administratively, on plaintiff's application to the Army Board for the Correction of Military Records, he requested in writing (on a form provided for such purpose), and was denied the opportunity to appear and be heard on his own behalf. On petition for rehearing before the Administrative Board, he, for a second time, requested the opportunity to appear and be heard, pointing out that his previous written request had been denied. His second request was likewise denied.

orders as void for lack of jurisdiction in that the administrative agency had no power to make a retroactive order. Plaintiff moved for summary judgment upon the ground (among others) that the reduction order was void. Defendant cross-moved for summary judgment. The Court denied plaintiff's motion and granted defendant's cross-motion for summary judgment upon the sole ground of laches in the application.

Upon rehearing, plaintiff pressed a single ground, namely, that the reduction order was absolutely void on its face for lack of jurisdiction; that laches do not apply to a void order; that it may be collaterally attacked at any time and at any place where it is relied upon, and that no other question

was before the Court below for consideration until it first came to gripe with the jurisdictional question.

On rehearing, the defendant did not in any way contest that proposition, contending only that such proposition applies only to the judgments and orders of "established Courts" and not to administrative orders.

At no time did the defendant, either in its answer to the petition, on the cross-motions for summary judgment, or upon rehearing, ever claim that the administrative agency had power or authority to make a retroactive order.

The nullity of the order was apparent upon mere inspection, as much so as a decree of divorce or of adoption made by a traffic officer or notary public.

The Court below did not at any time address itself to the jurisdictional validity of the orders under attack. It did not meet the issue. It did not resolve it. The question was not even debated. The Court did not say the challenged order was valid. The Court said only that it was too late to attack the order.

It was plaintiff's contention that the threshhold question presented was whether the order colaterally attacked was void, and that if it was void, relief from it must be granted.

But the litigation was laid at rest, and the challenged order left intact without a determination of whether it was a nullity and void in contemplation of law, and therefore of no binding

effect. But that is what courts are for, and failure to make that determination when the issue was squarely presented was an abandonment of its function by the Court below.

Plaintiff now claims, in this Court, that the order of the Court of Claims granting defendant summary judgment upon the basis of a void judgment or order is itself also void.

Jurisdiction of the United States Court of Claims was invoked under 28 USC 1491; United States Statutes at Large (64 Stat 112 et seq.), 50 USC 570 (now Title 10 USC 815 as Amended).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims holds that laches is a bar to an attack upon a judgment or order absolutely void

for want of jurisdiction to render it.

The most careful and painstaking research has failed to disclose a single precedent in any Court, in any jurisdiction, where laches was held as to bar an attack upon a judgment or order void for want of jurisdiction to make it. The decision of the Court below in so holding stands alone, and is unique in that regard.

Once the judgment or order was attacked as void for lack of power to make it, the Court had first to reach the question of jurisdiction to determine whether the order is void because the law is universal that laches do not apply to a void order. It is never too late to impeach a void order. (See Argument, infra).

The Court of Claims in brushing aside the jurisdictional issue which was squarely presented and insistently pressed by plaintiff, has so far departed from the accepted and usual course of judicial proceedings, and has additionally so far sanctioned such a departure by an administrative agency, as to call for this Court's power of supervision.

We say the issue was "brushed aside" because in its opinion below the Court of Claims was silent as to that threshhold jurisdictional issue, especially on rehearing where the single issue presented was whether the order under attack was void for want of power to make it.

Specifically, the decision below is in conflict with the decisions of the Courts of Appeal in the following circuits:

United States v. Sotis, (CA7,1942) 131 Fed 2d 783;
Austin v. Smith, (CA Dist Col,1962) 312 F 2d 537, 343;
National Labor Relations Board v. Pappas & Co., (9 Cir.,1913), 203 F 2d 571;
Wood Bros. Construction Co.,Inc. v Yankton County S.D., et al, (8th cir., 1931),54 F 2d 304;
United States v. Turner, (8th cir. 1931), 47 F2d 86,88;
Mitchell v. Village Creek Drainage District, (8th cir.,1946), 158 F 2d 475;
In re V-I-D, Inc., (7th cir.,1947) 158 F 2d 964;
Fischel v. Kite, (CA Dist. Col., 1939), 101 F 2d 685;
Berry v. Allen, et al, (6th cir., 1969), 411 F 2d 1142, 1146;
Bradley v. St. Louis Terminal Warehouse, (8th cir.,1951), 189 F2d 818, 824;
Commonwealth of Kentucky v. Casualty Co. of Baltimore, (6th cir.,1940), 112 F 2d 352, 356;
Bass v. Hoagland, (5th cir.,1949), 172 F 2d 205, 209;
Clay v. Sun River Mining Co.,(10th cir.,1962), 302 F 2d 599;
Davis v. St. Paul Mercury Indemnity Co., (4th cir.,1961), 294 F 2d 641, 643;
Glover v. Coffing, (CA 7-1946), 158 F2d 964.

The decision below is in direct conflict with the applicable decisions of this Court in the cases of:

Kilburn v. Thompson, (1880), 103 US 168, 198; 26 L.Ed. 377;
Williamson v. Berry, (1850),8 How. 495; 49 US;
Thompson v. Whitman, (1873), 18 Wall. 457; 85 US 457;
Knowles v. The Gas Light & Coke Co., (1873), 19 Wall.58; 86 US 58;
Pennoyer v. Neff, 95 US 714;
Williams v. State of North Carolina, (1945), 325 US 226,229, 65 S.Ct. 1092, 89 L.Ed.1577;
Rose v. Himley, (1808), 4 Cranch 240, 241, 8 US 240, 250 2 L.Ed. 608;
Windsor v. McVeigh, (1876), 93 US 274, 277, 282,

which hold that the jurisdiction of a Court or other tribunal to render a judgment is "always open to inquiry" when the judgment is relied on in any other proceeding.

Finally, the absence of notice and

an opportunity to be heard was a denial of due process of law under the Fifth Amendment of the Federal Constitution which rendered the order founded thereon a nullity "not entitled to respect in any other tribunal," (Windsor v. McVeigh, supra, at pages 277 and 282 of 93 U.S.; Bradley v. St. Louis Terminal Warehouse, supra, at p.824 of 189 F 2d; Bass v. Hoagland, at p.209 of 172 F 2d; and "attackable collaterally."

There can be no doubt that the Court below was unimpressed with an invasion of plaintiff's rights by a first reduction order which was retroactive only for a day, and a second order which was retroactive for only two weeks. Plaintiff, as the record shows first learned

of the reductions nine months after the event when he returned from his overseas tour of duty, and the Court below was persuaded that he should then have pursued his remedies, and accordingly sustained the equitable defense of laches as a bar to the action.

While the record also shows that plaintiff was prevented by acts of government from pursuing his remedy such that there were in fact no laches attributable to plaintiff, it is to be emphasized that the presence or absence of laches has neither significance nor materiality upon a challenge to jurisdiction.

When there is a frontal attack upon the jurisdictional validity of the orders, the equities of the situation are

in no manner germane, as we shall hereafter see, and it was simply not competent for the court below to circumvent the jurisdictional issue to consider how the equities preponderated. Laches could not confer jurisdiction. The validity of the challenged orders depended on the power and authority to make them. If that power was lacking, the clear duty of the court was to declare the orders null and void. The court below failed to exercise its judicial function in that regard.

POINT I

THE DOCTRINE OF LACHES DOES NOT APPLY TO A VOID ORDER.

The beginning point is that the challenged orders are void. SR 615-25-55,

having the force of law (Standard Oil Co. of Cal. v. Johnson, (1942), 316 US 481, 86 L.Ed. 1611, 62 S.Ct. 1168), delimits the power and authority pursuant to which its provisions may be implemented, which is but to say that it confers the jurisdiction under which its provisions are capable of enforcement.

It is not alone that the retroactive reduction orders violated the regulation. The point is that the regulation conferred neither power nor authority to make a retroactive order. Otherwise put, jurisdiction in that regard was lacking. Every act of a court, body or officer beyond its or his jurisdiction is void and a nullity.

A void judgment or order may be ignored as a nullity; it may be collaterally impeached, or it may be vacated at any time, and the doctrines of laches and estoppel do not apply.

These basic principles find application and expression in State and Federal jurisdictions alike, from the earliest times.

In the case of Thayer v. Village of Downers Grove, (1938), 369 Ill. 334, 16 N.E. 2d 717, the Court there expounded the rationale of the principle, as follows:

> "Where the Court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the Court, such judgment or decree is void and may be collaterally impeached

> or set aside on motion after the time for review by appeal has expired. (Citations). It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of laches and estoppel do not apply. Jurisdiction in a particular case is not only the power of the Court to hear and determine it, but also the power to render the particular judgment entered, and every act of the Court beyond its jurisdiction is void. People v. Shurtloff, 355 Ill. 210 189 N.E. 291; People v. Circuit Court of Washington County, 347 Ill. 34, 179 N.E. 441; People v. Sullivan, 284 Ill. 28, 119 N.E. 40; Ex Parte Reed, 100 US 13, 25 L.Ed.538." (Emphasis added)

In Ex Parte Reed, 100 US 13, 25 L.Ed. 538, last above cited, the Supreme Court declared:

> "We do not overlook that there must be jurisdiction to give the judgment rendered as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to

be imprisoned in the penetentiary or to suffer punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void.(Cornett v. Williams, 20 Wall. 226; Windsor v. Mc Veigh, 93 U.S. 274, 7 Waits Citations & Defenses, 181."

ACCORD: Valley v. Northern Fire & Marine Ins. Co. ( ), 254 US 348, 353, 354; 65 L.Ed. 297; 41 S.Ct. 116.

The proposition that a judgment or order, void on its face, (as in this case), may be attacked on that ground, either directly or collaterally, at any time is broadly stated in 49 C.J., S794, §401 as follows:

"On the other hand, a judgment which is absolutely void is entitled to no authority or respect and therefore may be impeached at any time, in any proceeding in which it is sought to be enforced or in which its validity

> is questioned, by anyone with whose rights or interests it conflicts."

As early as almost a century ago, this Court in Kilbourn v. Thompson, (1880), 103 US 168,198; 26 L.Ed. 177, noted that the tendency of the Courts "everywhere" is to the doctrine that:

> "... the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; The Gas-Light & Coke Co.,19 id 58; Pennoyer v. Neff, 95 US 714."

Professor Moore in his treatise on Federal Practice says of void judgments that they are but ".... judicial waste-paper" (Moore's Federal Practice, 2d Ed. 1954), Vol. 1B, 10.407, p. 935.

Similarly, in Freeman on Judgments (5th Ed. 1925), Sec. 322, p.645, the author says that ".... such a judgment has been characterized as a dead limb upon a judicial tree which may be chopped off at any time."

> "The theory underlying the concept of a void judgment is that it is legally ineffective - a legal nullity; and may be vacated by the Court which rendered it at any time. (Citation). Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life.(Many citations). Further, it may, when appropriately called in question, be adjudged void in any collateral proceeding and this collateral attack may be made at any time." (7 Moore's Fed Prac 315) (2d Ed. 1954). (Emphasis added)

In 1 Freeman on Judgments (5th Ed. 1925), sec. 271 (pp 538-539) the author states:

"§271. Laches in Application. Independent of any absolute limitations by statute upon the time within which an application to open or vacate a judgment may be made, it may also be defeated by laches. In the exercise of their discretionary powers courts act upon equitable principles. Whenever, therefore, the case presented is not one in which relief is a matter of right, unexplained delay in the application after knowledge of the facts will always be taken into consideration in harmony with the general equitable doctrine of laches, and may be sufficient to defeat relief even though the statutory period has not elapsed. This principle is applicable to all cases where the judgment is not void, whether the proceedings are founded on statute prescribing a maximum limit or whether based on grounds independent of statute. (Emphasis supplied).

And in Volume 3 of Freeman on Judgments, p. 2492, 2493, the author states:

> "If a judgment is void on its face it may be attacked on this ground either directly or collaterally at any time and in any Court in which it may be relied upon." (Emphasis added)

So also, in Volume 7 of Moore's Federal Practice at page 802:

> "A void judgment, state or federal, may be collaterally attacked;i.e., its nullity and ineffectiveness asserted at any time in any proceeding where the validity of the judgment comes in issue and is appropriately challenged."(Emphasis added)

By the same author in the same volume, at page 805 in a discussion of Rule 60 FRCP vis-a-vis collateral attack:

> "Since the void judgment establishes no binding legal obligations, it should not have any res judicata effect when its validity comes in question in any federal court. We conclude, therefore, that Rule 60(b) is dealing

with direct attacks upon judgments rendered by a federal district court in a civil action, and that it leaves undisturbed the right to make a collateral attack upon the federal judgment in any proceeding wherein the validity of the judgment is appropriately challenged.

Now as to time. Laches of a party will not infuse life into a void judgment. The judgment is a legal nullity and may be collaterally attacked at any time." (Emphasis added).

In Verbeem v. United States, (DC ED, Mich. 1957), 154 F. Supp. 431, 435, the Court remarked:

"A judgment rendered without jurisdiction over the subject matter in question is void and a void judgment may be attacked directly or collaterally at any time. See e.g., Williams v. State of North Carolina, 1945, 325, U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577; Rose v. Himely, 1808, 4 Cranch 241, 8 U.S. 241, 2 L.Ed. 608; 7 Moore's Federal Practice, Par. 60.41 (1), (2d Ed.1954)." (Emphasis added).

And in the cited Supreme Court case of Williams v. State of North Carolina, 325 U.S. 226, Mr. Justice Frankfurter, writing for the Court, at page 229 declared:

> "A judgment in one State is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits - - had jurisdiction, that is, to render the judgment.
>
> It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction ...". It was "too late" more than forty years ago. German Savings Society v. Dorsnitzer, 192 U.S. 125, 128." (Emphasis added).

It is too late in this case too, to deny plaintiff the right collaterally to impeach an order void on its face for lack of jurisdiction.

Both the text writers and the Courts are in agreement that it is "universally conceded" that a judgment void for lack of jurisdiction may be impeached "irrespective of lapse of time." (Moore's Fed. Prac. Vol. 7, ¶228, p.447; Freeman on Judgments, 2d Ed. ¶98).

That the proposition is "universally conceded" finds expression in case law - thus, in the Seventh Circuit, the Court of Appeals in the case of United States v. Sotis, (1942), 131 Fed. 2d 783, at page 787, quoting with approval from Anderson v. Anderson, 291 Ill. App. 421, 428, 11 N.E. 2d 216, 219, said:

> "There can be no question about the rule in Illinois and so far as we are advised it is no different in other jurisdictions. * * * It is universally conceded that a judgment void for want of

> jurisdiction over the person of a defendant may be vacated on motion, irrespective of lapse of time." Freeman on Judgments, (2d Ed.), 198.(Emphasis added).

Consequently, it was needless for the plaintiff to show that any equities preponderated in his behalf because such equities are irrelevant.

In 7 Moore's Federal Practice, page 301, Professor Moore states the proposition as follows:

> "A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, if he establishes that the judgment is void."

Of course, there could be no laches absent a duty to assert rights, and a void order imposes no such duty, Valz v. Sheepshead Bay Bungalow Corp., (1928),

249 N.Y. 122, 132, 133; Vol. 1, Freeman on Judgments, (5th Ed. 1925), §322, pp. 643, 644.

Laches, then, are irrelevant to the attack on the nullity on the orders. Laches was not the question before the Court. The question presented was whether the orders were void. That is the only question, whether the attack is direct or collateral, and is dispositive of the litigation.

In Austin v. Smith, (C A Dist Col, 1962), 312 F 2d, 337, 343, where there was a direct attack on the void judgment under Rule 60(b), FRCP, the Court said:

> "Under subsection (4) above, the only question for the court is whether the judgment is void; if it is, relief from it should be

granted. Similarly, under subsection (5), if the underlying judgment is void, the judgment based upon it is also void. Moreover, the Rule places no time limit on an attack upon a void judgment, nor can such a judgment acquire validity because of laches on the part of him who applies for relief from it." 3 Barron & Holtzoff, Federal Practice and Procedure, §1327 (1958). (Emphasis added).

ACCORD: Gimbel Bros. v. Corcoran, 15 N.J. Misc. 538, 192 A 715, 716,: ("Laches or estoppel are never invoked in support of an invalid proceeding or a void judgment."); Valz v. Sheepshead Bay Bungalow Corp., (1928) 249 N.Y. 122, cert. den. (1928), 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560 ("laches and estoppel do not apply."); Brenner v. Margolies, (1953), (Mun. Ct. App. for District of Columbia), 102 A 2d 300, 302, ("when a judgment is void, principles of estoppel and laches can not be invoked"); Cohen v. Ryan, (NY), 34 AD 2d 789, (No.6): ("Laches does not defeat a motion to vacate a judgment which is a nullity."); Flatbush Auto Dis-

count Corp. v. Reich, (NY) 190 Misc. 817; Sampson v. Ward, 395 Ill. 353, 70 N.E. 2d 324.

Neither could there be any question of degree of nullity of the retroactive orders, since that would relegate the court to a determination of how far, whether one day, two weeks, or two years, an administrative officer may legally relate back under the jurisdiction conferred upon him by the regulation.

The making of such a determination at once raises the question of the power of the court to make it.

In Valz v. Sheepshead Bay Bungalow Corp., (1928) 249 N.Y. 122, 133, the court in that regard said:

> "The statutory notice is the basis of the Court's jurisdiction; the Courts have no power

to hold that a notice not conveyed in a manner permitted by the statute may be equally effective."

POINT II

WANT OF NOTICE AND AN OPPORTUNITY TO BE HEARD IS A DENIAL OF DUE PROCESS RENDERING THE PROCEEDING AND THE ORDERS THEREIN A NULLITY AND VOID.

The proposition here contended for finds the clearest possible expression in this Court's holding in Windsor v. McVeigh, (1876), 93 U.S. 274, at page 277 where the Court declared:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all

> nations. A sentence of a Court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any way to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter."

Again, in Bradley v. St. Louis Terminal Warehouse Co., (CA-8, 1951), 189 F 2d 818, 824:

> "A judgment obtained without due process is a nullity and may be attacked directly or collaterally by parties or strangers."

ACCORD: Bass v. Hoagland, (CA 5, 1949) 172 F2d 205, 209.

POINT III

A JUDGMENT FOUNDED ON A VOID ORDER IS ALSO VOID.

This Court should declare the order and judgment of the Court of Claims to be void because founded upon a void administrative order. (Austin v. Smith, supra, at page 343 of 312 F 2d; Berry v. Allen, (6 cir. 1969), 411 F 2d 1142, 1146.

CONCLUSION

In the face of a threshhold attack upon the jurisdictional validity of the challenged orders it is enough simply to read the decisions below to recognize that the Court of Claims did not resolve the jurisdictional issue and thereby abdicated its judicial function in this case.

Federal courts are created, under the Constitution and by the Congress, to perform a judicial function. All cases and controversies must be disposed of by them in a judicial manner. The subversion of the judicial process presents a federal and constitutional question of substantial character which should be reviewed by this Court.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted,

OTIS MARK WATERS
297 Liberty Street
Newburgh, New York 12550.

Attorney for Plaintiff

A-1
Regulation, SR 615-25-15,
Department of the Army.

Changes to SR 6.5-25-55 now in force; C 2 and C 3; all others have been superded

SR 615-25-55
C 3

ENLISTED PERSONNEL

Reductions

Department of the Army
Washington 25, D.C., 10 November 1953

Changes)
No. 3)

SR 615-25-55, 2 May 1951, is changed as follows:

11. (Superseded) When effective. - Reductions of enlisted personnel will be effective -

a. When by sentence of courts-martial. As ordered executed in the court-martial order. Where a sentence to reduction has been imposed by a summary court, the reduction becomes effective upon being ordered executed by the coavening authority. (See MCM 1951,par.90e).

b. When by operation of law. - A reduction by operation of law under MCM 1951, paragraph 126c, becomes effective on the date of the order of execution or upon the final approval and suspension of a sentence. The words "upon being finally approved" as used in MCM 1951, paragraph 126c, are construed to refer to the affirming action that completes all required review.

c. In all other cases. - On the date upon which notice of reduction is received by the enlisted person, or, if absent for his own convenience or through his own fault, upon the date the notice of reduction is received at his proper station.
((AG 220.26 (13 Oct 53)AGRO)

By Order of the Secretary of the Army

M.B. RIDGWAY,
General, United States Army,
Chief of Staff.

OFFICIAL:
WM. E. BERGIN,
Major General, United States Army
The Adjutant General.

A-3

Opinion and Order of the United States Court of Claims dated March 6, 1973 on cross motions for summary judgment.

IN THE UNITED STATES COURT OF CLAIMS

No. 528-71

WILLIAM J. BENDER

v.

THE UNITED STATES

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the Court having been submitted on plaintiff's motion, filed August 28, 1972, and defendant's cross-motion, filed September 27, 1972, for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, without oral argument

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of counsel, it is concluded that plaintiff knew of his reduction in rank by August 13, 1954, but his suit was not filed until July 8, 1971, and therefore that his alleged claim is barred under the doctrine of laches. See Gersten v. United States, 176 Ct.Cl. 633, 364 F 2d 850 (1966); Grisham v. United States, 183 Ct. Cl. 657, 392 F 2d 980 (1968); and, Cason v. United States, 198 Ct. Cl. 650, 461 F.2d 784 (1972). It is further concluded that the defendant is not estopped from pleading laches. See Montilla v. United States, 198 Ct. Cl. 48, 457 F 2d 978 (1972).

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment be and the same is denied, defendant's

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cross-motion for summary judgment is granted and plaintiff's petition is dismissed.

BY THE COURT

Wilson Cowan

CHIEF JUDGE.

MAR-6 1973

Order of the United States Court of Claims on rehearing dated May 11, 1973.

IN THE UNITED STATES COURT OF CLAIMS

358-69 DONALD S. WEIR, Jr.	)	v. THE UNITED STATES
213-70 ROBERT SIMMONS CONSTRUCTION CO.,INC.	)	
444-70 ROLAND DORL	)	
528-71 WILLIAM J.BENDER	)	
847-71 DAVID H. BARAL	)	

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These cases come before the court on motions for reconsideration, rehearing, new trial, to strike affidavit and for further relief under Rules 151 and 152 of the rules of this court, and, on con-

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sideration thereof,

IT IS ORDERED this 11th day of May, 1973, that said motions be and the same are denied as follows:

358-69 Donald S. Weir, Jr. Plaintiff's motion for reconsideration and rehearing.

213-70 Robert Simmons Construction Co.,Inc. Plaintiff's motion for rehearing and/or for new trial. Defendant's motion to strike affidavit of Robert F. Simmons submitted in support of plaintiff's motion for rehearing and/or new trial is denied as moot.

444-70 Roland Dorl. Plaintiff's motion for reconsideration of the court's decision of February 16, 1973.

528-71 William J. Bender. Plaintiff's motion for rehearing of plaintiff's and defendant's cross-motions for summary judgment pursuant to Rule 151.

Order of the United States Court of Claims on rehearing dated May 11, 1973.

847-71 David H. Baral. Plaintiff's motion for reconsideration.

BY THE COURT

Wilson Cowen

Chief Judge.

No. 72-1719

FILED
AUG 13 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM J. BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

IRVING JAFFE,
Acting Assistant Attorney General,

ROBERT E. KOPP,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1719

WILLIAM J. BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A3-A5) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1973. Petitioner's timely motion for rehearing was denied on May 11, 1973. The petition for a writ of certiorari was filed on June 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a former serviceman's challenge to the legality of two administrative reductions in rank, one effective January 13, 1954, and one effective March 1, 1954, is barred by laches.

REGULATIONS INVOLVED

Department of the Army Special Regulation 615-25-55, May 2, 1951, as amended by Change 2, October 6, 1952, and Change 3, November 10, 1953, provides in part as follows:

ENLISTED PERSONNEL

REDUCTIONS

Section I

GENERAL

1. *General.*—The action to effect a reduction in grade will provide for reduction from the grade in which serving to an appropriate lower grade.

* * * * *

11. *When effective.*—Reductions of enlisted personnel will be effective—

a. When by sentence of courts martial.—* * *.

b. When by operation of law.—* * *.

c. In all other cases.—On the date upon which notice of reduction is received by the enlisted person, or, if absent for his own convenience or through his own fault, upon the date the notice of reduction is received at his proper station.

12. *Orders.*—Reductions of enlisted personnel will be announced in orders of the headquarters of the reduction authority. Required entries will be made in the service record and other pertinent personnel records. Reduction orders and service record entries will cite the specific paragraph of the regulations under which authority the reduction was accomplished.

13. *Revocation or recission of orders.*—Orders announcing the reduction of enlisted personnel issued by authority competent to effect such reduction will not be revoked or rescinded except by the issuing authority to correct an administrative error or by order of the Secretary of the Army.

Section II

REDUCTIONS FOR INEFFICIENCY

* * * * *

15. *Noncommissioned officers to next lower grade.*—Noncommissioned officers in grade E-4 may be reduced one grade by company or comparable commanders, and noncommissioned officers in grade E-7, E-6, and E-5 may be reduced one grade by regimental, separate battalion, or comparable commanders when for reason of inefficiency sufficient cause exists to warrant such action in the best interests of the service.

STATEMENT

The undisputed facts, as they appear in the Plaintiff's Brief in Support of Motion for Summary Judgment in the Court of Claims are as follows:[1]

Petitioner enlisted in the Navy in 1943. Upon expiration of his enlistment in 1946, he reenlisted in the Army, from which he was honorably discharged on December 6, 1957. On the date of his Army discharge, he reenlisted in the United States Air Force and served therein until retired for longevity on July 31, 1966.

---

[1]A copy of Plaintiff's Brief in Support of Motion for Summary Judgment is being lodged with the Clerk of this Court.

On January 13, 1954, by an order dated January 14, 1954, petitioner, then serving in the Army, was administratively reduced in grade from Sergeant First Class (Temporary) E-6 to Sergeant First Class (Temporary) E-5, under paragraph 15 of Army Special Regulation 615-25-55. On March 1, 1954, by an order dated March 15, 1954, he was again reduced in grade from Sergeant (Temporary) E-5 to his permanent grade of Corporal E-4, by authority of the same Special Regulation.

At the time of both reductions in grade, petitioner was serving in Korea. He claims that he was not notified of these reductions while abroad and that he continued to serve for several months without diminution in rank or pay. He alleges that it was not until after he was reassigned to Fort Jackson in the continental United States that he noticed his pay check was smaller. When he inquired about it, he was told that he had been "reduced." Upon further inquiry, he claims, he was referred to "Inspector General's" office at Fort Jackson where he was informed that he had no right to appeal.

Some 10 years later, on January 14, 1965, according to petitioner, an Air Force officer informed him of his right to appeal. This officer requested petitioner's records from the Army Records Center. When, in response to this request, the officer was informed that the Special Orders concerning petitioner's reductions were not on file, the officer allegedly informed petitioner that he was without further recourse.

On August 19, 1969, three years after his retirement, petitioner applied to the Army Board for Correction of Military Records for the restoration of his grade and pay together with the promotions to which he claimed he was entitled. This application was denied in February 1970, and a request for further consideration was denied in March 1971.

In July 1971, petitioner filed a petition in the United States Court of Claims, seeking annulment of his administrative reduction, restoration of rank, the promotions to which he would have been entitled, pay for the period between the reduction and his retirement at the correct rank, and an increase in his retirement allowance to the amount which he would have received had he not been reduced in rank. The court denied petitioner's motion and granted the government's cross-motion for summary judgment on the ground that the claim was barred by laches (Pet. App. A3-A5).[2]

ARGUMENT

Petitioner's sole contention is that laches cannot bar his claim for back pay, because the orders reducing his rank were made effective retroactively and without notice or opportunity to be heard and were therefore "void for lack of power to make" them (Pet. 14). He cites many cases for the proposition that a void *judgment* may be collaterally attacked at any time (Pet. 16-36). But this is not a collateral attack on a judgment of a court. It is an effort to overturn an administrative order some 18 years after that order was effective. This Court has held that one who has been removed from a government office by the proper authority, but who alleges he was given no notice or opportunity to be heard, cannot recover the pay to which he claims he was entitled if he had not been diligent in asserting his rights. See *Nicholas* v. *United States,*

---

[2] The Court of Claims previously denied the government's motion to dismiss, which had been based on the 6-year statute of limitations of 28 U.S.C. 2501. The court held that the statute had been tolled by the Soldiers' and Sailors' Relief Act of 1940, as amended, 50 U.S.C. App. 525.

257 U.S. 71, in which a claim filed three years after removal was held barred by laches. See also *Arant* v. *Lane*, 249 U.S. 367, in which a 20-month delay amounted to laches.

These decisions control this case. There is no authority for petitioner's view that a different rule should apply whenever the claimant argues that the order of removal or reduction was "void" rather than simply "unlawful." Regardless of the label used, the claimant may not sit on his rights. The Court of Claims properly determined that in the circumstances of this case 18 years was too long to wait. There is no reason for further review of that determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General,
ROBERT E. KOPP,
DAVID M. COHEN.
Attorneys.

AUGUST 1973.

DOJ-1973-08

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AUG 31 1973
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IN THE

Supreme Court of the United States

October Term, 1973.

No. 72-1719

WILLIAM J. BENDER,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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Newburgh, N. Y. 12550

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IN THE

SUPREME COURT OF THE UNITED STATES
October Term,
1973
NO:

WILLIAM J. BENDER,

Petitioner,

-V-

THE UNITED STATES,

Respondent.

PLAINTIFF'S REPLY BRIEF

If defendant is right, this Court proclaims two concepts of law, each diametrically opposed to the other. The one, (contended for by plaintiff) - that laches never bar an attack upon a void judgment or order,* - the

---

* Kilbourn v Thompson,(1880) 103 US 168, 198 and Supreme Court cases there cited.

other, (contended for by defendant) - that laches is a bar to the attack.**

Of course, no such conflict exists, and this Court has not, as we shall see, adopted mutually exclusive concepts of law.

Of a void order, we said on pages 22-23 of our main brief:

> "In the case of Thayer v Village of Downers Grove, (1938), 369 Ill. 334, 16 N.E. 2d 717, the Court there expounded the rationale of the principle, as follows:
>
> > 'Where the Court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the Court, such judgment or decree is void and may be collaterally impeached or set aside on motion after the time for review by appeal has expired. (Citations). It is a rule well established that a void judgment or order may be

** Nicholas v. United States, 257 US 71, citing Arant v. Lane, 249 US 367.

vacated at any time and the doctrines of laches and estoppel do not apply. Jurisdiction in a particular case is not only the power of the Court to hear and determine it, but also the power to render the particular judgment entered, and every act of the Court beyond its jurisdiction is void. People v. Shurtloff, 355 Ill. 210 189 N. E. 291; People v. Circuit Court of Washington County, 347 Ill. 34, 179 N.E. 441; People v. Sullivan, 284 Ill. 28, 119 NE 40; Ex Parte Reed, 100 US 13, 25 L.Ed. 538."
(Emphasis added)

In Ex Parte Reed, 100 US 13, 25 L.Ed. 538, last above cited, the Supreme Court declared:

> 'We do not overlook that there must be jurisdiction to give the judgment rendered as well as to hear and determine the cause. * * * ' "

And on page 25 of our main brief:

> "As early as almost a century ago, this Court in Kilbourn v. Thompson, (1880), 103 US 168, 198; 26 L.Ed. 177, noted

that the tendency of the Courts "everywhere" is to the doctrine that:

> '... the jurisdiction of a Court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; The Gas-Light & Coke Co., 19 Id 58; Pennoyer v. Neff, 95 US 714.' "

In the face of those authorities, the defendant in its brief in opposition now relies on Nicholas v. United States, 257 US 71, which cites Arant v. Lane, 249 US 367. The defendant's reliance is misplaced. It may be observed at the outset that neither of the challenged orders in those cases were void. Both of those cases involved a simple application of the bar of laches to a stale claim. In neither case was there a

jurisdictional attack upon the authority of the Secretary to make the challenged order. The Secretary, in both cases, had the power to make the challenged order. The question in each case there presented to the Court was whether, having that power, it was exercised in compliance with the statute. In Nicholas, the Court so stated (at page 75 of 249 US):

> "The question presented is whether the plaintiff may recover his salary when removed without compliance with the statute*, where he delays taking any steps to test the legality of his removal, or asking for an opportunity to be heard for the length of time herein shown.
>
> , We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection, and may not

* As distinguished from "... when removed without power ...."

> for an unreasonable length of time, acquiesce in the order of removal which it was within the power of the Secretary to make, and then recover for the salary attached to the position." (Emphasis added)

Thus, there was present in Nicholas precisely what is absent in our case, namely, jurisdiction - the power to make the order under attack.

In the Arant case also there was no jurisdictional attack. The authority of the Secretary in the Arant case to make the order was not challenged, was not considered, and was not even discussed. This Court so stated, (at page 371 of 249 US), as follows:

> "Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him, and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia on the ground of laches and the

case is here on writ of error.

* * *

> We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically (as distinguished from jurisdictionally) justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed." (Emphasis added)(Matter in parenthesis supplied)

Having the power to remove the relator, jurisdiction attached. Once jurisdiction existed, the failure to give notice was a "technicality" to which laches applied upon delay. In Nicholas and Arant, this Court was dealing with orders which the Secretary had power to make. For that reason Nicholas and Arant do not, and cannot stand as authority for our case, since in our case the orders are challenged as void

for lack of power to make them.

We are aware that in Nicholas, (at p.74), the Court noted the nature of the plaintiff's claim there as follows:

> "It is alleged that being able and willing to discharge the duties of the office, plaintiff was entitled to compensation because of his illegal removal by failure to comply with the provisions of the Act of August 24, 1912, 37 Stat at L 555, * * *." (Emphasis added)

And we have seen that this Court, in stating the question there presented for review, said:

> "The question presented is whether the plaintiff may recover his salary when removed without compliance with the statute where he delays taking any steps to test the legality of his removal, or asking for an opportunity to be heard for the length of time herein shown." (Emphasis added)

In no sense did this Court there suggest by that language that the claim of "illegal removal", and the need to

test the "legality" of the removal involved an attack upon the orders as jurisdictionally void. The defendant at bar, however, availing of those quoted words in its brief, says of the Nicholas and Arant cases that:

> "These decisions control this case. There is no authority for petitioner's view that a different rule should apply whenever the claimant argues that the order of removal or reduction was 'void' rather than simply 'unlawful'. Regardless of the label used, the claimant may not sit on his rights." (Emphasis added)

The orders in Nicholas and Arant "which it was within the power of the Secretary to make" that were there called "unlawful" for failure to comply with the statute may not be equated with the orders in our case which for want of power to make them were and remain legal nullities binding on no one.

This brings us to the distinction between void and voidable orders and

judgments. Voidable judgments, of course, are those which are valid until avoided.

The beginning point, then, is that ours is a collateral attack upon the orders as absolutely void on their face for want of jurisdiction to make them.

Of collateral attack, Freeman on Judgments (5th Ed.) (Sec. 321, p.641) states:

> "The contention of a collateral assailant must be that the judgment he is attacking is void not merely voidable;that either it emanated from a tribunal having no legal existence, or else was rendered without jurisdiction, owing to the fact that the Court pronouncing it may have failed to acquire the requisite jurisdiction in the first instance, or may have lost jurisdiction in the course of the proceedings, or else transcended its lawful powers in making the decision." (Emphasis added)

Of void and voidable judgments, the same author states, (Sec. 322, p.642):

> "A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect, no judgment at all, conferring no right and affording no justification. Nothing can be acquired or lost by it: it neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title. It neither binds nor bars anycone. All acts performed under it and all claims flowing out of it are void. * * * The fact that the void judgment has been affirmed on review in an appellate court or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff, but constituting a constant menace to defendant.
>
> The line is carefully drawn between the foregoing judgments that are wholly void and

> those that are merely voidable. Collateral attack does not reach the latter adjudications. The law provides adequate remedies for obtaining direct relief from erroneous or irregular decisions. It is not the policy of the law to permit a party to such judgments to stand idly by without availing himself of the opportunity given him to repair the mistakes and missteps of a court acting within its jurisdiction although in an erroneous manner and to reserve his objections for litigation in a collateral proceeding. Unless it appears that the court proceeded without jurisdiction or in excess of its powers, the presumptions that sustain judicial action and records will outweigh any collateral showing amounting to mere proof of voidability. The cases are very numerous upon this point. They hold without exception that a judgment will be sustained on collateral attack unless it is wholly and absolutely void; that it cannot be overcome by matters that merely render it voidable."
> (Emphasis added)

In Nicholas and in Arant, the Secretary acted within his authority in making

the removal order, and it was claimed the decision was wrong because he failed to give a statutory notice. In our case the Secretary acted beyond his authority.

We are reminded in Freeman on Judgments, (Sec. 354, p.734) that:

> "A wrong decision made within the limits of the Court's authority is error correctable on appeal or other direct review but a wrong, or for that matter a correct decision where the court in rendering it oversteps its jurisdiction and power is void and may be set aside either directly or collaterally. * * * Hence, though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction even though the parties may have acquiesced or consented

> to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition can confer a power upon the court which the law does not authorize it to exercise."

If "no act or volition can confer a power on the court which the law does not authorize it to exercise", it is plain that laches cannot serve to confer that power.

REPLY TO DEFENDANT'S CLAIM THAT COLLATERAL ATTACK ON VOID JUDGMENTS DOES NOT APPLY TO ADMINISTRATIVE ORDERS.

On page 5 of its brief defendant argues as follows:

> "Petitioner's sole contention is that laches cannot bar his claim for back pay, because the orders reducing his rank were made effective retroactively and without notice or opportunity to be heard and were therefore "void for lack of power to make" them (Pet.14). He cites many cases for the proposition that

> a void judgment may be collaterally attacked at anytime (Pet. 16-36). But this is not a collateral attack on a judgment of a court. It is an effort to overturn an administrative order some 18 years after that order was effective."

We have seen in Thayer v. Village of Downer's Grove, supra, that

> "It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of laches and estoppel do not apply."

Defendant advanced the same argument below on rehearing, as follows:

> "Plaintiff's motion is based upon the theory that the doctrine of laches does not apply to a void order or judgment. He cites the comments of recognized authorities on Federal Procedure and the effect of judgments, and also cites some decisions of theSupreme Court of the United States to support his theory.
>
> A simple review of the authorities cited by plaintiff reveals that they have no application in the present case. Plaintiff's cited authorities

> deal with the effect of orders or judgments of established courts. They have absolutely no application in the case of an administrative order effecting the reduction in grade of an Army enlisted man for inefficiency."

Our reply* to that argument in this Court is the same as on rehearing below, where we said:

> "This astonishing claim, made in all apparent seriousness, is that an order, void on its face for want of jurisdiction, otherwise subject to collateral attack at any time at any place where it may be relied on, is beyond the reach of the courts because the void order here sought to be impeached is an administrative determination and as such, immune to collateral attack.
>
> It is enough to say that the Supreme Court, as early as almost a century ago, in Kilbourn v. Thompson, 103 US 168, 198, 26 L.Ed. 377, declared:
>
> 'The tendency of modern decisions everywhere is to the

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* Plaintiff's Reply Brief is on file in this Court.

> doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in any other proceeding, (See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; Knowles v. The Gas-Light & Coke Co., 19 id 58; Pennoyer v.Neff, 95 US 714.'

An administrative agency is such a "tribunal". So, too, is an administrative officer, say, the Secretary of an Executive Department such as the Department of the Army, or the Department of the Interior. And an administrative determination or order, made without or in excess of jurisdiction is void, subject to impeachment in collateral or direct attack, in like manner as a void judgment or order of an "established court."

In Oil Shale Corporation v. Udall, Secretary of the Interior, (D.C. Col, 1966), 261 F.Supp. 954, 965, the Court said:

> 'It is, of course, so fundamental as to require no documentation, that an adjudication by a tribunal

> lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be res judicata. When as here, the Department acted beyond the authority granted to it by law, it acted in the particular area beyond its jurisdiction. The Supreme Court told the Department this in language as plain as legal language can be. * * *
>
> This Court, however, must follow the law as laid down by the Supreme Court of the United States. It is upon this basis that we conclude that the actions of the Department in assuming jurisdiction over the failure to do assessment work is void and of no effect whatever.'

On the Secretary's appeal, the Court of Appeals affirmed: (10th Cir., 1969) Udall, Secretary of the Interior v. Oil Shale Corporation, 406 F 2d 759, 763, saying:

> 'We find no change in the authority of the Secretary since theSupreme Court decisions referred to above. There has been some relatively minor statutory

change, but it does not effect this issue. The Supreme Court held in Virginia-Colorado that the Secretary was acting outside his statutory authority when he cancelled the claims for the reason he did. The Court said:

> 'We think that the Department's challenge, its adverse proceedings, and the decision set forth in the Bill went beyond the authority conferred by law."

It was a clear and direct holding, and it followed the Krushnic decision and, of equal importance, it followed Cameron v. United States, 252 US 450, 40, S.Ct. 410. The decision must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to cancel the claims. This in the administrative area must be taken to mean his actions were void, and of no legal effect. They went beyond his authority conferred by law, and this is the sole source of his power. Pan American Petroleum Corp. v. Person, 284 F 2d 649 (10th Cir.). The Secretary so

> understood as indicated in the departmental decision in the Shale Oil Co., 55 ID 287, and by his later patenting of other cancelled claims. If his acts are so treated, the cancellation of the claims here concerned were of no effect, and they stand as if no departmental action to cancel had been taken.

The Supreme Court reversed, but on other grounds, (Hickel v. Oil Shale Corporation, (1970), 400 US 48, 27 L.Ed. 2d, 193, 91 S.Ct. 196), specifically leaving open on remand the validity of the administrative proceedings and judicial review "if they are found void", thus (at page 201 of 27 L.Ed.):

> 'Therefore, on remand, all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, all issues as to the invalidity of the claims will be open.' "

ACCORD: National Labor Relations Board v Pappas & Co., (9 Cir. 1913) 203 F 2d 571; Pan Am Petroleum Co. v. Pierson, (10 Cir. 1960), 284 F2d 649; United States v. 1380 Acres of Land, (SD Texas 1950), 91 F Supp 1002, 1004.

CONCLUSION

The defendant's authorities are clearly inapplicable, and it remains that the single thrust of defendant's defense is that plaintiff's claim "is an effort to overturn an administrative order some 18 years after that order was effective." The trouble is that the order was never effective, and if there be a villain in the piece, it is the Secretary of the Army who exceeded his powers, for it is there that the root of the evil lies.

Obviously, the Courts will resist a stale claim, especially one of an inordinate delay of "some 18 years". But that is the simple meaning of the doctrine of laches.

Courts do not alter the law to fit the equities of a particular case

when the law universally is that there are no equities available under a void judgment or order that is as nugatory 18 years after the event as it was 18 minutes after the event. The passage of time cannot infuse life into those void orders.

The defendant has no standing to appeal to the conscience of the Court. If it were permissable to consider how equities preponderate under a void order, it would remain that the dilemma stemmed not from laches in asserting the claim, but from the fact that the Secretary acted in excess of his power and authority. The conclusion always remains that laches do not apply to a void order.

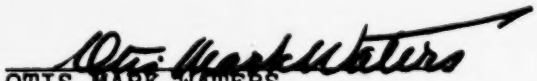
We are reminded by Austin v. Smith, (CA Dist.Col. 1962), 312 F2d 337,343, that:

> " * * * the only question for the Court is whether the judgment is void; if it is, relief from it should be granted."

That is the posture of the case in this Court.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,



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